Alternative Dispute Resolution in Hazardous Waste Siting: A Solution for Ohio and East Liverpool?

I. INTRODUCTION

Progress has its costs. As our society continues to expand in size and complexity, we create benefits while generating new and difficult problems. Nowhere is this more evident than in the siting of facilities. Airports, prisons, power plants, landfills, and shopping centers are things that most everyone would agree are necessary and desirable for the efficient operation of a modern society.[1] Yet ask who is willing to have such a facility in his or her community and the reflex response will assuredly be, "*No, not here.*" This "Not in My Backyard" (NIMBY) response has become "the rule rather than the exception"[2] for the developers and planners attempting to construct unpopular facilities.

The NIMBY reaction is, of course, understandable. A facility, if effectively and efficiently operated, will benefit society as a whole, yet the cost of these benefits will be disproportionately borne by the host community.[3] Thus, the targeted community reacts with costly litigation and public pressure with the hope of making it economically infeasible to proceed with the proposed project.

These dynamics clearly hold true in the case of siting hazardous waste facilities. The consequences of these battles are quite severe in light of the estimated one trillion pounds of hazardous waste that are produced yearly in the United States.[4] The Wisconsin Legislature explicitly recognized this reality when it drafted its facility siting statute.[5] The legislature found that "the creation of solid and hazardous waste is an unavoidable result of the needs and demands of modern society, . . . [and] disposal of hazardous waste is necessary to preserve the economic strength of [the] state and to fulfill the diverse needs of its citizens."[6] While most recognize that hazardous waste is a necessary evil that should be dealt with in a responsible and safe manner, few are willing to stand idle while their communities are slated for new sites.[7]

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1. *See* MICHAEL O'HARE ET AL., FACILITY SITING AND PUBLIC OPPOSITION 1 (1983).

2. *Id.* at 6.

3. Ivan Fong, *Hazardous Waste Facility Siting Through Negotiation*, 6 STAN. ENVTL. L.J. 161, 163 (1986-87).

4. Andrea Shalal-Esa, *Ohio Incinerator Fight Highlights U.S. Waste Problems*, REUTER ASIA-PACIFIC BUS. REP., Feb. 8, 1993 *available in* LEXIS, News Library, Curnws File.

5. *See* WIS. STAT. § 144.445 (1989-1990).

6. *Id.* § 144.445(1)(a) & (d).

7. *See* O'HARE et al., *supra* note 1, at 7.

A. East Liverpool, Ohio

The NIMBY phenomenon has surfaced in East Liverpool, Ohio where Waste Technologies Industries (WTI) recently began operating one of the largest hazardous waste incinerators in the country.[8] When fully operational, the 165 million dollar incinerator is expected to burn 60,000 tons of hazardous waste per year.[9] The facility has been the source of enormous controversy ever since its proposed development in 1981.[10] The controversy and opposition, however, are not limited to East Liverpool but rather extend to neighboring West Virginia and Pennsylvania where residents and officials are concerned about the potential health risks associated with being down-wind from the plant.[11] Over the course of the last twelve years, the East Liverpool facility has been the subject of constant litigation and public opposition, resulting both in great delay and in huge expenditures of financial resources.[12] The fight to condemn the plant's operation progressed all the way to the White House. During the course of the 1992 Presidential campaign, then Vice Presidential candidate Al Gore said that the Clinton Administration would seek to halt operations until such time as Congress could investigate both the plant's safety and the process by which the plant obtained its state and federal operating

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8. *See* Keith Schneider, *2 Admit E.P.A. Violated Hazardous Waste Law in Issuing Permit*, N.Y. TIMES, May 6, 1992, at A15.

9. *See* Keith Schneider, *Gore Says Clinton Will Try to Halt Waste Incinerator*, N.Y. TIMES, Dec. 7, 1992, at D9. The plant is authorized to burn over 300 toxins including chemical warfare agents, pesticides, and herbicides. T.C. Brown, *Fisher Mum on Waste Probe Details; EPA Given Finished 200 Page Report on $165 Million Burner*, THE PLAIN DEALER, June 19, 1993, at 5B.

10. Much of the controversy stems from the fact that the facility is situated about 400 yards from an elementary school and about 100 yards from residential housing. *See* Colman McCarthy, *Gore Loses His 'Balance'*, WASH. POST, June 22, 1993, at C10. Six months after WTI received the necessary construction and operating permits, Ohio established new rules that prevent siting hazardous waste facilities in such close proximity to schools or residential areas. *See* Schneider, *supra* note 8, at A15.

11. *See Staggers Calls on EPA to Deny WTI Spray Dryer Authorization*, PR NEWSWIRE, Mar. 24, 1992, *available in* LEXIS, News Library, Curnws File. It is interesting to note that while the WTI incinerator controversy rages, cement kilns burn more hazardous waste as a fuel source than most commercial incinerators. This practice was left virtually unregulated until 1991, and even now the enforcement of those regulations has been questionable. *See* Betsy Carpenter & David Bowermaster, *The Cement Makers' Long, Sweet Ride*, U.S. NEWS & WORLD REP., July 19, 1993, at 51.

12. In late 1992, officials of WTI testified that delays in the plant's operation were costing the company $115,000 per day in fixed costs and were jeopardizing several long-term contracts with customers. *See* Paul Kemezis, *Ohio Incinerator Given the Go-ahead*, CHEMICAL WK., Nov. 25, 1992, at 14.

permits.[13] Like many promises made in the course of a political campaign, this pledge appears to have become buried in an ambitious political agenda.[14] The promise itself, nevertheless, demonstrates the scope and intensity of the dispute.

B. A Possible Solution?

In an attempt to deal with the inherent problems associated with siting hazardous waste facilities, several states have incorporated alternative dispute resolution (ADR) techniques into their siting statutes. Through the use of negotiation and arbitration, these statutes strive to have the host community and the developer work together to produce a binding agreement that will outline the obligations of each party.[15] Proponents of ADR believe these techniques will help ensure that all parties to the dispute will be able to participate meaningfully[16] in the siting process and ultimately ensure that the facility will not endanger public health and safety.[17]

This Comment will explore the possibility of incorporating ADR provisions into Ohio's hazardous waste siting statute, using the East Liverpool incinerator as a case comparison. This examination will begin by outlining Ohio's statutory provisions for siting hazardous waste facilities and detailing some of the major disputes that have arisen in connection with the siting of the East Liverpool incinerator. This Comment will then explore the efforts of two states, Massachusetts and Wisconsin, to use ADR provisions to alleviate public opposition to proposed hazardous waste facilities. This examination, in conjunction with the problems experienced in East Liverpool, will reveal some potential

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13. *See* Schneider, *supra* note 9, at D9.

14. Many opponents of the incinerator feel betrayed by what they perceive as the Clinton Administration's failure to aggressively intervene in East Liverpool as promised during the campaign. On December 7, 1993, several opponents protested this inaction in front of the White House and were subsequently arrested on felony charges after handcuffing themselves to a dump truck. *See* Kimberly C. Moore, *Ohio Protestors Demonstrate Against Gore's "Hypocrisy,"* STATES NEWS SERVICE, Dec. 7, 1993, *available in* LEXIS, News Library, Curnws File.

15. Note, *The Hazardous Waste Facility Siting Controversy: The Massachusetts Experience*, 12 AM. J.L. & MED. 131, 138 (1986).

16. Susan Caskey, *Alternative Dispute Resolution and Siting Hazardous Waste Facilities: The Pennsylvania Proposal in Light of the Wisconsin and Massachusetts Statutes*, 5 TEMP. ENVTL. L. & TECH. J. 58, 59 (1986).

17. Phillip M. Cronin, *Environmental Law--Hazardous Waste Disposal Facility--Ability of City or Town to Prevent Siting*, 70 MASS. L. REV. 40 (1985).

benefits, as well as limitations, of any attempt to incorporate ADR into Ohio's hazardous waste siting statute.

II. HAZARDOUS WASTE SITING UNDER OHIO LAW

Under Ohio law, one wishing to establish a hazardous waste treatment facility must begin by giving notice of the general design and purpose of the facility to the legislative authority of each municipal corporation, township, and county in which the site may be located.[18] Following this notice, the applicant must submit an application for a hazardous waste facility installation and operation permit to the state Director of the Environmental Protection Agency.[19] If the application appears to comply with agency rules and meets applicable performance standards, the director will forward the application to the Hazardous Waste Facility Board (Board).[20]

The Board, whose membership includes the state Director of the Environmental Protection Agency, the Director of the Department of Natural Resources, the Chairman of the Ohio Water Development Authority, one chemical engineer, and one geologist, is responsible for scheduling and conducting a public hearing on the application.[21] At this hearing, any person may "submit written or oral comments or objections to the approval or disapproval of the application."[22] The Board will then conduct an adjudication hearing to decide all disputed issues between the parties respecting the approval or disapproval of the application.[23] The parties to this adjudication hearing include the applicant, the staff of the Environmental Protection Agency, the Board of County Commissioners, the Board of Township Trustees, the chief executive officer of the municipal corporation in which the facility is proposed to be located, and any other person who would be aggrieved or adversely affected by the

18. OHIO REV. CODE ANN. § 3734.05(C) (Baldwin 1992).

19. *Id.*

20. *Id.* § 3734.05(D)(3).

21. *Id.* § 3734.05(D)(1).

22. *Id.* § 3734.05(D)(3)(a). This hearing is non-adversarial. Instead, it is a forum in which those affected by the proposed facility can gain information and express concerns. *See* OHIO ADMIN. CODE § 3734-1-02(G) (1986).

23. OHIO REV. CODE ANN. § 3734.05(D)(6) (Baldwin 1992). In contrast to the public hearing, the adjudication hearing is adversarial in nature and resembles traditional litigation, complete with pre-trial conferences, discovery, rules of evidence, and witnesses. *See generally* OHIO ADMIN. CODE §§ 3734-1-27 to -1-52 (1986).

proposed facility.[24] The Board then evaluates the application and ultimately gives its approval or disapproval based on criteria including the facility's environmental impact, its effect on public health and safety, and its compliance with other statutory guidelines.[25] A party who is adversely affected by the Board's decision can appeal the order and decision to the Court of Appeals of Franklin County, Ohio.[26] The order of the Board will be affirmed if the Board's order is "supported by reliable, probative, and substantial evidence and is in accordance with the law."[27]

While obtaining the required approval to site a facility is a necessary first step in beginning operations, it is just that -- a first step. As the events in East Liverpool demonstrate, the fight to prevent an unwanted facility from being sited will often continue well past the permitting stage of development. These protracted fights often result in huge financial losses capable of dooming a facility to failure. It is the recognition of this reality that inspired states like Massachusetts and Wisconsin to incorporate ADR into their siting statutes. If potential controversies can be addressed up front through a process of negotiation, future controversies can hopefully be limited. In order to begin evaluating the potential value of such a siting scheme in Ohio, it is helpful to outline the workings of both the Massachusetts and Wisconsin statutes.

III. THE MASSACHUSETTS STATUTE

The Massachusetts process begins with the submission of a notice of intent by the developer to the Hazardous Waste Facilities Site Safety Council[28] (Council), as well as to designated governmental department directors, the chief executive officer of the host and abutting communities,

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24. OHIO REV. CODE ANN. § 3734.05(D)(4)(a)-(d) (Baldwin 1992). A person claiming to be "aggrieved or adversely affected by the proposal" must file a petition to intervene no later than 30 days after the date of publication of public hearings. The petition will be granted by the Board if good cause is shown. *See id.* § 3734.05(D)(4)(d).

25. *Id.* § 3734.05(D)(6). While Ohio's statutory scheme allows for local involvement and citizen participation through the adjudication hearing, the ultimate approval or disapproval of the application is made by the Board. In this respect, Ohio's process resembles a more traditional adversarial approach to resolving disputed issues.

26. *Id.* § 3734.05(D)(7).

27. *Id.*

28. MASS. ANN. LAWS ch. 21D, § 7 (Law. Co-op. 1992). The Council is a twenty-one member body made up of state and local government officials, a professional chemical engineer, a professional hydrogeologist, six private citizens, and representatives from municipal, health, and industrial associations. *See id.* § 4(13).

appropriate regional planning agencies, and persons owning real property on the site.[29] The Council is required, within fifteen days of the notice of intent, to review the proposed project to determine if the proposal is "feasible and deserving of state assistance."[30] Upon notification by the Department of Environmental Management that a community is on the final list of suggested sites established by the Council, the chief executive officer of the targeted community is to create a local assessment committee (Committee).[31] The Committee is composed of various community leaders and four residents that stand to be most immediately affected by the proposed facility.[32] It is the Committee's duty to represent the best interests of the host community in all negotiations and "to negotiate the detailed terms, provisions, and conditions of a siting agreement to protect the public health, safety, and the environment of the host community."[33] In order to help ensure that the Committee is able to adequately fulfill these obligations, the statute provides for the availability of technical assistance grants to the Committee and abutting communities.[34] These funds are to be expended for the purpose of allowing the Committee to gain the requisite expertise and resources necessary to effectively negotiate with the developer who, in all likelihood, is more knowledgeable in the technical aspects of the proposed facility.[35]

Ultimately, the site cannot be constructed unless a siting agreement is arrived at between the developer and the Committee of the host community.[36] The siting agreement specifies the terms and conditions upon which the facility can be constructed and operated.[37] Among the more important terms that must be contained in the siting agreement are the following: (1) "compensation, services and special

29. *Id.* § 7. The notice of intent is required to include certain information including: a description of the types of hazardous wastes that the facility would handle; a description of the technology and procedures to be employed; and the potential location, if known, of the facility. *Id.* § 7(1)-(3).

30. *Id.*

31. *Id.* § 5.

32. *Id.*

33. MASS. ANN. LAWS ch. 21D, § 5(1)-(2) (Law. Co-Op. 1992).

34. *Id.* § 11.

35. These technical assistance grants are limited initially to $15,000, but communities may petition for additional grants if the need arises. *Id.* § 4(5).

36. *Id.* § 12.

37. *Id.*

benefits that will be provided to the host community by the developer,"[38] (2) "operating procedures and practices, the design of the facility and its associated activities,"[39] (3) "monitoring procedures, practices and standards necessary to assure and continue to demonstrate that the facility will be operated safely,"[40] and (4) "provisions for resolving any disagreements in the construction and interpretation of the siting agreement that may arise between the parties."[41] Throughout the negotiations, the Council is to facilitate the negotiation process by making reports, opinions, and public records available to the parties.[42]

In the event that the negotiations result in an impasse, the Council may frame the appropriate issues in dispute for submission to final and binding arbitration.[43] Ultimately, the final agreement, whether arrived at with or without the aid of arbitration, results in a binding, nonassignable contract enforceable in any court of competent jurisdiction.[44] With this statutory scheme as a backdrop, it is useful to compare the siting approach employed by the state of Wisconsin.

IV. THE WISCONSIN STATUTE

Like the Massachusetts statute, the Wisconsin statute seeks to "create and maintain an effective and comprehensive policy of negotiation and arbitration between the applicant for a license and a committee representing the affected municipalities."[45] Through this system of negotiation and, if necessary, arbitration, the statute seeks to prevent

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38. MASS. ANN. LAWS ch. 21D, § 12(5) (Law. Co-Op. 1992). The statute also allows abutting communities to petition the Council for compensation to be paid to it by the developer. This petition requires the chief executive officer of the abutting community to agree to accept the compensation as determined by the Council or by a three person arbitration panel. *See id.* § 14.

39. *Id.* § 12(2).

40. *Id.*

41. *Id.* § 12(9).

42. *Id.* § 13.

43. MASS. ANN. LAWS ch. 21D, § 15 (Law. Co-Op. 1992). The arbitration panel can take one of two forms. One option is to have a three member panel comprised of one member selected by the developer, one member selected by the Committee, and one "impartial arbitrator" who is selected by both the developer and the Committee. Alternatively, the developer and the Committee can agree to select a single "impartial arbitrator" that is acceptable to both parties. *Id.* § 15.

44. *Id.* § 12.

45. WIS. STAT. § 144.445(2) (1989-1990).

debilitating local opposition by providing a mechanism that will assure that local concerns and needs will be addressed.[46]

The Wisconsin approach is very similar to the Massachusetts statute in its scheme to include local participation in the siting process. This local participation begins when a municipality receives a written request for specifications of local approval from the applicant.[47] At this point, the affected municipalities must prepare themselves for the negotiation process by appointing members to the local committee (Committee) and by adopting siting resolutions.[48] "The siting resolution [must] state the affected municipalities' intent to negotiate and, if necessary, arbitrate with the applicant concerning the proposed facility."[49] The Committee, as the representative of the affected municipalities, is composed of officials and citizens who can adequately address the needs and concerns of the constituency.[50]

A. Negotiation Between Committee and Applicant

Under the Wisconsin statute, the applicant and the Committee are free to negotiate with respect to all subjects except those subjects that pertain to the need for the facility and those subjects that deal with proposals to make the applicant's responsibilities under the approved feasibility report or plan of operation less stringent.[51] While the parties are afforded wide latitude in choosing subjects to negotiate, there are only certain subjects that are appropriate for arbitration under the statute. These subjects include: (1) "[c]ompensation to any person for substantial economic impacts which are a direct result of the facility including insurance and damages not covered by the waste management fund,"[52] (2) "[o]perational concerns including, but not limited to, noise, dust, debris, odors, and hours of operation but excluding design capacity,"[53] (3) "[u]ses of the site . . . after closing the facility,"[54] (4)

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46. *See id.* § 144.445(2)(a)-(b).

47. *Id.* § 144.44(1m)(b).

48. *Id.* § 144.445(7)(a).

49. *Id.* § 144.445(6)(a).

50. The Committee is made up of four members of the town, city or village in which the facility is proposed to be located, two members of the resident county and one person from each affected municipality. WIS. STAT. §§ 144.445(7)(a)(1), (a)(1m)-(a)(2) (1989-1990).

51. *Id.* § 144.445(8)(b)(1).

52. *Id.*

53. *Id.* § 144.445(8)(b)(3).

54. *Id.* § 144.445(8)(b)(5).

"[e]conomically feasible methods to recycle or reduce the quantities of waste to the facility,"[55] and (5) "[t]he applicability or nonapplicability of any preexisting local approvals."[56]

As the negotiations proceed, either party can petition the Waste Facility Siting Board (Board) to determine if a proposal is excluded from negotiation.[57] Negotiating sessions may be conducted with the assistance of a mediator if mediation is approved by both the applicant and the Committee.[58] If the applicant and the Committee cannot agree on the selection of a mediator, the applicant and the Committee may request the Board to appoint a mediator.[59]

If an agreement is not reached on any item, either party independently or both parties jointly may submit a written petition to the Board to initiate arbitration.[60] The Board conducts arbitrations and issues arbitration awards that are binding on the parties.[61] If the Board fails to issue an arbitration award within ninety days, the governor shall issue the award.[62]

B. Technical Determinations

It is key to note that while the negotiation outlined above proceeds, a separate set of hearings and determinations are conducted regarding the technical merits of the proposed facility. The applicant is required to submit a feasibility report to the Department of Natural Resources (Department) for evaluation and approval.[63] The feasibility report addresses issues such as the site's characteristics, the facility's design, and the potential adverse health effects to surrounding residents.[64] After the feasibility report and environmental impact statement, if necessary, are submitted, the public is given a chance to gain information, submit comments, and even challenge the factual content of the report.[65]

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55. WIS. STAT. § 144.445(8)(b)(6) (1989-1990).
56. *Id.* § 144.445(8)(b)(7).
57. *Id.* § 144.445(9)(b).
58. *Id.* § 144.445(9)(c).
59. *Id.*
60. WIS. STAT. § 144.445(10)(a)-(b) (1989-1990).
61. *Id.* § 144.445(19)(p)-(q).
62. *Id.* § 144.445(10)(p).
63. *Id.* § 144.44(2)(a).
64. *Id.* § 144.44(2)(f)-(m).
65. WIS. STAT. § 144.44(2g)(c) & (2r) (1989-1990).

Ultimately, the Department will either approve or disapprove the proposed facility based on the technical merits.[66]

V. EXPERIENCES UNDER THE WISCONSIN AND MASSACHUSETTS STATUTES

On paper, both the Wisconsin and Massachusetts statutes seem to provide a thoughtful, logical process through which those involved can work out their differences and ultimately come to an agreement. In practice however, the statutes, particularly the Massachusetts statute, have not performed up to expectations.[67] To date, there have been no successful sitings under the Massachusetts statute.[68] In fact, there have been no serious negotiations between parties.[69] The statute has been so ineffective that Massachusetts has ceased its attempts to site hazardous waste facilities under the statute.[70] The experience in Wisconsin has been a bit more positive. Under its statute, there have been sixteen negotiations that ultimately resulted in several successful sitings.[71] However, these cases involved sitings under the statute's provisions for solid waste facilities.[72] It has been used successfully only to expand a few hazardous waste facilities, rather than to site any new ones.[73] With this reality as a starting point, it is necessary to compare these two statutes in order to explain their successes and failures.

The lesson to be learned from the relative success of the Wisconsin experience, as compared with the Massachusetts experience, appears to be the necessity of separating political and technical questions surrounding the proposed site.[74] As outlined above, the Massachusetts approach involves a technological feasibility decision by the Council within fifteen days of the submission of a notice of intent. As Professor Jonathan Brock argues, the Council, whose twenty-one members are essentially

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66. Note that it is this bifurcated process, whereby the technical determinations are made separately from those pertaining to the socio-economic impact of the facility, that has been cited as a key reason for the relative success of the Wisconsin statute. *See* Jonathan Brock, *Mandated Mediation: A Contradiction in Terms*, 2 VILL. ENVTL. L.J. 57, 74 (1991).

67. *See id.* at 71.

68. *Id.*

69. *Id.*

70. *Id.*

71. Brock, *supra* note 66, at 71.

72. *Id.* at 74.

73. *Id.* at 60, n.5.

74. *Id.* at 74.

political and representational, does not have the "technical capacity nor the protection from community pressure to resist local opposition"[75] in making such a determination. In this context, it is not surprising that negotiations in Massachusetts have never progressed seriously.[76]

As outlined above, the Wisconsin approach is designed to avoid this problem by excluding technical issues from the agenda of the siting board. Instead, the Department of Natural Resources performs studies and holds hearings to determine the technical merits and safety of the proposed facility.[77] Simultaneously, the host community and the developer are left to discuss the social and economic questions that will become issues if and when the facility is granted approval on a technological basis.[78] Thus, by separating the political and technical issues, the Wisconsin proceedings are less subject to political maneuvering and pressure and, theoretically should be accorded greater respect from all parties involved. Despite this possible improvement, however, there are numerous problems that will continue to plague attempts to employ ADR in siting hazardous waste facilities. These limitations must be recognized when considering whether ADR could be a useful tool in Ohio's statutory scheme.

VI. ADR IN HAZARDOUS WASTE SITING: AN INCOMPLETE ANSWER TO A DIFFICULT PROBLEM

A. A Failure in Underlying Assumptions

Despite the qualified success of the Wisconsin approach, several fundamental problems persist when employing ADR in hazardous waste siting disputes. First, as Professor Jonathan Brock argues, it has been very difficult to institutionalize mechanisms for negotiated settlements between conflicting interests.[79] Professor Brock contends that institutionalized mechanisms for resolving these disputes lack the necessary flexibility that is needed to match the circumstances of the dispute to the parties.[80] It is an attempt to lay the groundwork for successful

75. *Id.*

76. Brock, *supra* note 66, at 71.

77. *Id.* at 74.

78. *Id.*

79. *Id.* at 59.

80. Symposium, *Alternative Methods of Resolving Environmental Disputes*, 2 VILL. ENVTL. L.J. 1, 6 (1991).

negotiation before knowing the specific dynamics of the particular dispute.[81] On the other hand, when parties come to the table voluntarily, ultimate resolution is more likely because the parties are able to establish the appropriate process and ground rules to fit the specific conflict at hand.[82]

Indeed, one dynamic that is overlooked in the incorporation of ADR in siting disputes is the fact that there might be a range of views concerning the desirability of a proposed facility. This certainly is the case in East Liverpool, Ohio where a significant number of vocal supporters of the incinerator believe it to be a safe and vital element for the future economic health of the community.[83] This situation presents a conflict for those community representatives, many of whom hold political office, who must attempt to bargain from a position based on the best interest of the community as a whole while, at the same time, keeping an eye toward the protection of their political careers.

Second, both statutes further assume that a community will ultimately agree to the developer's proposal if the requisite "deal" is sweet enough. Under the Massachusetts statute, as envisioned by Professor Lawrence Bacow, the potential compensation paid by the developer to the host community would, in theory, be so enticing that the end result would be a competition among several targeted communities to obtain the facility.[84] However, there are many communities in which opposition runs so high that compensation can never approach that needed to satisfy the community.[85] This appears to be the case in Massachusetts. As Professor Bacow contends, "no single developer of one of these facilities [in Massachusetts] could afford to compensate a community."[86]

Professor Bacow notes that one lesson to be learned is that for negotiated compensation to work, the financial resources are going to have to come from additional sources.[87] Clearly, a business that expects to operate at a profit cannot withstand the financial burden of public opposition forever. For many companies, the financial sacrifice will be unbearable and as a consequence, a potentially beneficial facility will never be realized. Indeed, this is the heart of the siting dilemma. Because it is

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81. *Id.* at 7.

82. *Id.* at 6.

83. Paul Glastris, *Environmental Fights in the Family*, U.S. NEWS & WORLD REP., Jan. 11, 1993, at 27.

84. *See* Symposium, *supra* note 80, at 33.

85. *Id.*

86. *Id.*

87. *Id.*

ultimately in the state's best interest to ensure that safe and efficient disposal facilities are sited, one possible solution is to provide state financial assistance to those proposals that meet the technological and safety requirements.

B. Resistance Away From the Bargaining Table

Probably the most significant shortcoming of any attempt to employ ADR in this context is that it does not preclude the traditional combative approaches that communities can take in an attempt to frustrate a developer. This is a significant point in that it strikes at the very heart of the assumptions upon which the scheme for ADR in siting was built. Specifically, it is assumed that negotiating parties will be able to work out their differences at the bargaining table and thus avoid a need for confrontational tactics. By taking control of the negotiation, rather than allowing a detached governmental body to make critical decisions on its behalf, the affected community controls its own destiny. However, when this assumption fails, the benefits of a system of negotiation begin to evaporate.

Philip Cronin has outlined several legal maneuvers that are still available to communities in Massachusetts seeking to prevent a siting in their community. First, under the Massachusetts law, the developer has the power to locate a hazardous waste facility on land zoned for industrial use.[88] However, a community can legally eliminate all industrial zoning *prior* to receiving a notice of intent from a developer.[89] Second, there are numerous approvals and permits that the developer must receive through state departments and local boards in order to begin construction and operation.[90] Many of these determinations are subject to judicial review in court. Thus, aggressive opponents have the incentive and, indeed, the ability to bring litigation to challenge the findings of these bodies.[91] Finally, the arbitration provisions do not define criteria that the

88. *See* Cronin, *supra* note 17, at 40.

89. *Id.*

90. *Id.* at 40-41.

91. *Id.* Not surprisingly, opponents of the East Liverpool incinerator looked for ways to challenge the validity of WTI's operating permit in an attempt to frustrate the facility's operation. One example involved whether WTI's operating permit reflected the true owners of the plant. According to a 296 page report by the Ohio Attorney General, the four original companies that made up the WTI partnership and that obtained the operating permit had substantially changed. Some of the original companies have been replaced and all of the partners are now owned by Von Roll America. Because Ohio law requires all hazardous waste facility owners to undergo a background investigation, many incinerator opponents had hoped this subsequent investigation would lead to findings that would result in the permit's

arbitrator is to employ in resolving impasses.[92] Because the arbitration order is subject to judicial review, any unfavorable order can be challenged on the grounds that the arbitrator exceeded his or her power.[93]

Clearly, these tactics will often be motivated less by a desire to protect the health and welfare of the community than by a desire to simply prevent an unwanted facility from being built. With this in mind, it is necessary to consider whether these factors outweigh the potential usefulness of ADR in Ohio.

VII. WOULD ADR BE EFFECTIVE IN OHIO?

A. The Wrong Answer for East Liverpool

This brings us back to the situation in East Liverpool, Ohio. What is to be learned there? In one sense, developers of the incinerator might feel justified in downplaying the usefulness of ADR techniques. Despite all of the controversy and hostility surrounding the project, the facility was sited and has begun operating. What explains this "success"? One could argue that the answer, ironically, lies partly in the fact that the Ohio statute prevents local citizens from taking as instrumental a role in the siting process as would be the case in Massachusetts or Wisconsin. The ultimate decision to grant primary approval is contingent upon the approval of a siting board, which is fairly isolated from the pressures and localized prejudices against the incoming developer. The developer is not required to jump through the additional hoop of negotiating with local leaders concerning social and economic considerations.

With respect to the East Liverpool incinerator, this argument has some merit. A number of factors have contributed to make this particular controversy a bad candidate for an effective negotiation. First, despite the assurances from government officials, many are not convinced of the incinerator's safety.[94] These fears would likely prove to be a major

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revocation. *See WTI Idles Incinerator, Faces Ownership Question From Ohio Attorney General*, HAZARDOUS WASTE BUS. July 14, 1993, *available in* LEXIS, News Library, Curnws File.

92. Cronin, *supra* note 17, at 41.

93. *Id.*

94. This fear has been exacerbated by the fact that the incinerator is located close to a school and to residential housing. These concerns are not without merit. Results from the incinerator's test burn in March of 1993 revealed that it released four times the acceptable amount of mercury. *See* T.C. Brown, *WTI's Dioxin Emissions Found Excessive By EPA*, THE PLAIN DEALER, June 24, 1993, at 5B.

obstacle in conducting any fruitful negotiation. Second, the facility is geographically situated such that the potential harmful effects of the facility are a matter of concern for neighboring communities in several states. While these "affected communities" will be the recipients of the harmful health effects of the incinerator, they will not receive any of the economic benefits that the incinerator will bring to East Liverpool.[95] With only negatives to be gained by the siting of the incinerator, these communities would be motivated to approach a negotiation with but one goal -- to ensure that the incinerator never begins operation. The concern about the potential widespread health effects has attracted the attention of environmental groups and activists who have the resources to bring public pressure and litigation to frustrate the operation of the incinerator. These factors combine to make a process of negotiation in the siting of the East Liverpool incinerator a formula for failure. This, however, does not mean that a system of negotiation and arbitration has no place in Ohio's statutory scheme.

B. Another Time, Another Place

Despite its probable lack of effectiveness in East Liverpool, ADR should not be summarily dismissed as a worthless option for Ohio's siting scheme. The qualified success of the Wisconsin approach indicates otherwise. However, for this system to be successful in Ohio, certain pitfalls should be avoided.

First, a comparison of Wisconsin's experience and the experience in East Liverpool does demonstrate one obvious point: The more controversial a proposed facility is, the greater the likelihood for eventual failure. While there will surely be a few residents within a community that will rally against a proposed facility, regardless of how benign, a facility has a much better chance of success if a developer can alleviate the concerns of local residents. In this respect, developers should endeavor to propose constructing facilities that employ demonstrated, workable technology.

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95. Both Senator Rockefeller of West Virginia and Representative Alan Mollohan of West Virginia took steps to impede the incinerator's operation by calling for a federal investigation into the validity of WTI's permit. Their concerns stemmed from the failure of the original permit to include the Columbiana County Port Authority as an owner of the site. *See Rockefeller Challenges Incinerator Process*, UPI, Feb. 5, 1992, *available in* LEXIS, Nexis Library, Current File. A month later, Representative Joseph Kolter of Pennsylvania called for a complete halt to the incinerator's construction until an investigation into the legality of WTI's permit could be resolved. *See Lawmaker Wants Incinerator Construction Halted*, UPI, Mar. 4, 1992, *available in* LEXIS, News Library, Curnws File.

Second, the local community must feel confident in the facility siting board's technological feasibility and health and safety determinations. Further, the local community must trust that the developer will be held to exacting compliance standards by state and federal regulators. If this confidence is eroded, the chances of a successful negotiation will be put in jeopardy.

Much of the above holds true whether ADR is used or the siting takes place under a traditional statute. However, by incorporating a system of negotiation and arbitration into Ohio's siting statute, parties may feel less compelled to resort to combative tactics, resulting in a savings of time and resources. If this holds true, it would prove helpful as Ohio moves into the next century.

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